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Supreme Court of the United States

October Term, 1973

No. 73-1838

GILES CRISLER, Commissioner of Public Safety of the State of Mississippi, et al.,
Petitioners,

versus

WILLIE MORROW and JEROME MANGUM, individually and on behalf of all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sitting *en banc* which is the subject of the Petition (App. B of Petition) is now reported at 491 F.2d 1053.

A stay of proceedings pending application for certiorari was denied by the District Court on May 15,

1974. Motions by petitioners for recall and stay of the mandate of the Fifth Circuit were denied by the Court of Appeals on June 3, 1974, and by this Court on June 17, 1974, 42 U.S.L.W. 3691.

QUESTION PRESENTED

Whether, after District Court findings that petitioners had engaged in a long and pervasive pattern and practice of racial discrimination in hiring and employment and that petitioners' "all-White" reputation among Black citizens in Mississippi had discouraged Blacks from applying for positions, and supplemental statistics provided by petitioners showed that the relief ordered by the District Court was insufficient to eradicate petitioners' unconstitutional employment practices and their effects, the Court of Appeals erred in remanding the case back to the District Court to fashion some form of affirmative hiring relief that would have the certain result of increasing the number of Blacks employed by petitioners and would eliminate present continuing discrimination in hiring and recruitment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
42 U.S.C. § 1981.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens * * *"
42 U.S.C. 1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

The two plaintiffs (respondents here), one a Black Vietnam veteran with police experience in the Air Force and the other a Black college student, were refused application forms for patrolman positions with the all-White Mississippi Highway Patrol in June, 1970, and filed this class action on July 30, 1970

against state officials in charge of the Mississippi Department of Public Safety and the Highway Patrol to gain equal hiring and employment opportunities pursuant to the guarantees of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. The defendants (petitioners here) are the Governor of Mississippi, who as chief executive officer of the state controls the policies and practices of the Department and Patrol (A. 67),[1] the Commissioner of Public Safety, who is the titular head of the Department and Patrol, the Chief of Patrol, and the Personnel Officer of the Department of Public Safety. Neither the State of Mississippi, nor either of the state agencies involved, are named defendants in this action.

The United States was granted leave by the District Court to appear as amicus curiae, and both in the District Court and the Court of Appeals supported plaintiffs' requests for affirmative hiring relief to correct the effects of past discrimination in hiring and employment by officials of the Department of Public Safety and the Highway Patrol.

A. Findings of the District Court

The undisputed facts, as found by the District Court, showed that of the 743 employees in the Mississippi Department of Public Safety, of which the Highway Patrol is a division, only 17 were Black, and these Blacks were employed exclusively in the jobs of cook

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[1] "A." references are to the pages of the appendix filed with and attached to the Petition.

and janitor (A. 74). Of the 27 bureaus of the Department, only two had any Black employees at all—the cooks at the Training Academy and the janitors in the Maintenance Bureau. (id.)

Officials of the Highway Patrol had never in its history — since 1938 — employed a Black person as a sworn officer in a state which is 36.7 Black (1970 Census) (id). Between January 1, 1968 and the time of trial (June, 1971), 107 Whites had been hired in patrolmen positions (id.), and all but twelve had friends or acquaintances employed by the Patrol (A. 78). Most of the present patrolmen learned of vacancies and the fact that applications were being accepted through word-of-mouth inquiry from patrolmen who were their friends and relatives, and the majority of the clerical positions in the Department were filled by walk-ins, many of whom were recommended by present employees (A. 77). Favoritism and partiality had been shown to those applicants having relatives, friends and acquaintances on the all-White Patrol (A. 80).

The District Court found that as a result of defendants' discriminatory practices the Department and Patrol have a reputation throughout Mississippi, and particularly among Black communities, as all-White agencies, and this reputation has discouraged Blacks from applying for employment (A. 79).[2]

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[2]In addition, the Mississippi Legislature has imposed upon Highway Patrolmen a statutory duty to enforce Mississippi's "steelhard, inflexible, undeviating official policy of segregation,"

The District Court further found, and its findings were affirmed on appeal, that applicants for Patrol positions had been required to pass the Otis Quick Scoring Mental Ability Test and an oral spelling test, and that neither test had been validated to show a significant relationship with successful job performance (A. 76). Neither the Department nor the Patrol publicly announced job vacancies, nor advertised the availability of positions in communications media serving the Black community (A. 78). Recruitment programs were presented to audiences which were predominantly White, and a motion picture used for recruiting portrayed an all-White Patrol (except for Black cooks and food servers) (A. 78-79). Until shortly before trial, no Department or Patrol rules prohibited the use of derogatory racial epithets, and the term "nigger" had been used by patrolmen in addressing blacks (A. 79).

The District Court held that the defendants had engaged in "a pattern and practice of racial discrimination in hiring and employment practices" in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 (A. 86), and entered a decree enjoining future

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United States v. *City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963), on rehearing, 320 F.2d 870, in Miss. Code Ann. § 4065.3 (1956 Recomp., repealed April 3, 1970) requiring Highway Patrolmen and other state officials to prohibit school desegregation and integration of the races, and Highway Patrolmen have been involved in efforts to suppress civil rights protest demonstrations, *NAACP* v. *Thompson*, 357 F.2d 831 (5th Cir. 1966), cert. denied, 385 U.S. 820 (1966); *Perkins* v. *Mississippi*, 455 F.2d 7, aff'd en banc, 470 F.2d 1371 (5th Cir. 1972).

discrimination in hiring and employment (A. 94-100)[3] However, without stating any reasons, the District Court specifically denied plaintiffs' request for result-oriented affirmative hiring relief (A. 101).

A three-judge panel of the Court of Appeals unanimously affirmed the District Court's finding that the defendants had engaged in a constitutionally prohibited pattern and practice of racial discrimination in hiring and employment, but split (2-1) in holding that the District Court did not abuse its discretion in failing to order affirmative hiring relief. In dissent, Judge Goldberg noted, "The order affirmed by the majority does not obligate the defendants to hire *any* Blacks" (A. 35).

B. Defendants' Supplemental Statistics.

After plaintiffs' petition for rehearing *en banc* had been granted, the present defendants[4] on October 12, 1973, filed with the Court of Appeals a statistical report entitled "Defendants' Submission on Employment and Testing Statistics Since January 1, 1972"

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[3]The District Court denied the two individual plaintiffs specific relief in the form of employment and back pay on the ground that an employment freeze was in effect at the time they sought applications, but held that they were entitled to the benefits of the class relief and that their applications should be processed without discrimination. To date Morrow and Mangum have not been hired because of the defendants' continuing racially discriminatory hiring practices.

[4]The present state administration took office in January, 1972, and the successors to the original defendants were substituted as defendants by the District Court pursuant to Rule 25(d), F. R. Civ. P. (A. 116).

(Attached as Appendix A) which showed that racial discrimination in hiring by the Highway Patrol and the Department of Public Safety had been perpetuated by the successors of the original defendants and that the relief ordered by the District Court was insufficient to eliminate and eradicate the present effects of past employment discrimination by defendants and their predecessors. This report showed that of the approximately 400 patrolmen and recruits employed by the Patrol as of October, 1973, two years after the entry of the District Court's decree, only 6 were Black. The report further showed that between January 1, 1972 (when the present defendants took office) and October, 1973, the Patrol had hired 91 Whites and only 6 Blacks (including two then in recruit training) out of a total of 264 Black applicants, and that the entire Department of Public Safety had hired 222 Whites and only 28 Blacks (including patrolmen and recruits) out of a total of 273 Black applicants.

Although the defendants discontinued the Otis Quick Scoring Mental Ability Test and the oral spelling test for patrolman applicants pursuant to the District Court's injunction, they substituted for these tests the equally discriminatory and unvalidated Army General Classification Test (AGCT).[8] The de-

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[8]The AGCT was held to be racially discriminatory against Black police applicants and has never been validated to show a significant correlation with successful job performance in police officer positions in *Smith* v. *City of East Cleveland*, 363 F.Supp. 1131, 1150 (N.D. Ohio 1973).

fendants' October, 1973 report to the Court of Appeals showed that the AGCT had a severe racially discriminatory impact with a pass rate for Whites (66.6) percent) taking the tests 5.2 times the pass rate for Blacks (12.9 percent), a disparity much greater than in any of the appellate cases in which racial discrimination had been found. Testing for employment with the entire Department of Public Safety was equally discriminatory on the basis of statistics provided in the defendants' report, with a pass rate for all White applicants for Department positions (69 percent) being 3.6 times the pass rate for Blacks (19 percent).

C. Opinion of the Fifth Circuit.

On rehearing *en banc* the entire Fifth Circuit determined 13 to 2 that "the relief ordered by the District Court is insufficient" (A. 41) and that the defendants' statistics contained in their submission

> "alone negate the State's argument that its present practices are nondiscriminatory, and give no support whatsoever to any argument that the decree appealed from is sufficient to eliminate the effects of past racial discrimination." (Id.)

The Fifth Circuit found that the defendants' entrance requirements in use during this period, specifically the high school diploma requirement and the Army General Classification Test, had not been job-validated despite the showing of a disproportionate racial impact, that the qualifications for positions and/or the

recruitment practices of defendants have been discriminatory in effect, that the defendants' recruitment practices and hiring criteria should be reexamined by the District Court, and that the case should be remanded "for the District Court, in the first instance, to fashion an appropriate decree which will have the certain result of increasing the number of Blacks on the Highway Patrol" (A. 42). However, the full Fifth Circuit made it clear that it was not requiring "that the proportion of Blacks on the Patrol mirror the proportion of Blacks in the population" (A. 43). Petitioners' statement in their Petition that the Court of Appeals suggested that the qualifications for the Patrol might need to be lowered (Petition, p. 4) is misleading and erroneous; the Fifth Circuit specifically stated: "We emphasize, however, that the imposition of some affirmative hiring relief need not inexorably lead to the dilution of valid employment qualifications" (id.).

Until the District Court fashions some form of affirmative hiring relief, Black applicants will continue to be denied equal employment opportunities in the Department of Public Safety and the Highway Patrol. On May 17, 1974, the defendants graduated another all-White recruit training class consisting of 15 White patrolmen. On remand, the District Court has ordered a temporary hiring freeze, except for emergency situations, and ordered the defendants to submit a comprehensive affirmative hiring plan after which a hearing is to be held. To date no affirmative hiring relief has been ordered by the District Court.

In remanding the case back to the District Court to require the defendants to adopt nondiscriminatory and job validated hiring criteria, to augment their recruitment program and insure that sufficient numbers of qualified Black applicants apply, and to engage in an affirmative hiring program which will increase the number of Blacks employed until the residual effects of past employment discrimination have been eliminated, the Court of Appeals went no further than what the Constitution and applicable Federal statutes require to remedy discrimination and to insure equal employment opportunities for all citizens. In cases involving violations of civil rights protected by the Fourteenth Amendment and Federal statutes, this Court has declared the fundamental principle that Courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). This fundamental principle of affirmative remedial action is fully applicable to cases of employment discrimination involving public employers. E.g., *Castro* v. *Beecher*, 459 F.2d 725, 736 (1st Cir. 1972); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1340 (2d Cir. 1973); *Carter* v. *Gallagher*, 452 F.2d 327, 328 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972).

Prior to the filing of this lawsuit, Blacks in Mississippi were completely excluded from the Highway Patrol and from all but the most menial positions in the Department of Public Safety. To remedy this long-

standing practice of exclusion, some affirmative hiring relief — left to the informed discretion of the District Court — is required, since Congressional legislation providing remedies for employment discrimination was "not intended to freeze an entire generation of Negro[es] . . . into discriminatory patterns that existed before the Act." *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 506 (E.D. Va. 1968).

Contrary to petitioners' assertions, this case does not involve the question of an absolute hiring preference "solely on the basis of race" (Petition, p. 5). The affirmative hiring remedy required by the Court of Appeals does not include all Blacks, or even all Blacks who apply for Patrol positions, regardless of qualifications. The Fifth Circuit made it clear that affirmative hiring does not require the defendants to hire Black applicants who are not qualified under objective, nondiscriminatory, and job-validated hiring criteria (A. 43). No one is required to be hired simply because he or she is Black. Thus, the guidelines established by the Fifth Circuit operate to exclude many Blacks who are not objectively qualified for Patrol employment, and in this sense the affirmative hiring remedy is employment-related rather than strictly racial. Cf. *Morton* v. *Mancari*, 42 U.S.L.W. 4933, 4939 (U.S. Nos. 73-362 and 73-364) (June 17, 1974). The affirmative hiring remedy mandated by the Fifth Circuit is not a racial preference in the absolute sense, but only constitutes a remedy for hiring discrimination reasonably designed to require the defendants to hire qualified Black applicants who otherwise would have been rejected be-

cause of the defendants' racially discriminatory hiring policies.

Similarly, this case does not involve the question of a "racial preference" faced by the Court in *DeFunis* v. *Odegaard*, — U.S. —, 40 L.Ed.2d 164 (1974). Unlike *DeFunis* which involved a "benign" quota, this case involves a judicial determination of unconstitutional racial discrimination in hiring and employment by a court of competent jurisdiction, and the search for an effective remedy for the constitutional violation. Nor does the relief ordered by the Court of Appeals constitute a racial quota, since the Fifth Circuit specifically stated that: "It is not required that the proportion of Blacks on the Patrol mirror the proportion of Blacks in the population" (A. 43).

Some form of result-oriented affirmative hiring relief was ordered by the Fifth Circuit only after it had determined based upon statistics presented by the defendants that affirmative relief was necessary to secure constitutional rights and that the passive relief ordered by the District Court was insufficient to eliminate the present effects of past racial discrimination. The relief required to be entered by the District Court is not preferential, but only "temporary" (A. 43) and remedial, designed to overcome the present effects of past discrimination and to be abrogated as soon as the residual effects of this past discrimination have in fact been eliminated.

Thus, contrary to petitioners' assertions, the decision of the Court of Appeals breaks no judicial new

ground (Petition, p. 6), but constitutes simply the application of sound constitutional principles declared by this Court and similarly applied by other Courts of Appeals to remedy and eliminate pervasive and firmly entrenched racial discrimination in hiring and employment which violates the constitutional rights of plaintiffs and the class they represent. As such, the relief ordered by the Court of Appeals does not conflict with, and is completely consistent with, the rulings of this Court in employment discrimination cases, and is in complete accord with the overwhelming weight of authority in every other circuit which has ruled on affirmative hiring relief in similar cases. The decision below is manifestly correct, and the issues raised by the petitioners do not present any substantial question which needs to be resolved by this Court.

ARGUMENT

I. The Decision Below Does Not Conflict With Any Applicable Decision of This Court Nor With Any Similar Decision of Any Court of Appeals.

The instant opinion of the Court of Appeals requires the District Court (i) to scrutinize the defendants' recruitment and hiring criteria to insure that Black applicants are attracted and that objective, nondiscriminatory, and job-validated hiring criteria are utilized, and (ii) to order some form of affirmative hiring relief that will have the certain result of increasing the number of defendants' Black employees. The first re-

quirement is fully consistent with this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and the Petition does not seriously question the constitutionality or necessity of this form of relief.

The second requirement derives from the "consequences test" of discrimination embraced by this Court in its unanimous decision in *Griggs* v. *Duke Power Co.*, supra. In *Griggs*, this Court rejected the notion that a discriminatory purpose must be shown to invalidate an employment practice, and held that employment practices which have a disproportionate adverse impact on minorities must fall unless the employer can bear its burden of showing that the practice is significantly related to successful job performance. "... Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (401 U.S. at 423).

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 401 U.S. at 430.

This standard was reaffirmed and expanded by the Court in *McDonnell Douglas Co.* v. *Green*, 411 U.S. 792, 805 (1973), in which the Court held that statistical evidence of a general policy of employment discrimination may be relevant on whether adverse action against an individual employee conformed to a general pattern of discrimination against Blacks.

The nature of the remedy required to cure unlawful class employment discrimination flows from the consequences test of discrimination established by *Griggs*. To be fully adequate, the remedy must be one that alters the consequences of the employers' discriminatory practices and produces acceptable results:

> "Once discrimination is found, the remedy must destroy the adverse effect on minorities as rapidly as possible, while leaving a decree of flexibility in the implementation of the corrective measures. In the case of discriminatory failures to recruit and hire, the courts have properly required defendants to use a numerical standard for hiring minorities." A. Blumrosen, *Strangers in Paradise: Griggs* v. *Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 93 (1972).

The use of racial ratios and numerical standards as a remedy for hiring and employment discrimination is completely consistent with this Court's holdings in the school discrimination cases in which the Court held that

> "when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy." *North Carolina Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971): cf. *United States* v. *Montgomery Co. Bd. of Educ.*, 395 U.S. 225 (1969) (teacher ratios).

The constitutionality and necessity of result-oriented hiring relief to cure unconstitutional and unlawful hiring and employment discrimination by both public and private employers have been fully accepted by the Courts of Appeals throughout the country. As Judge Clark points out in his concurring opinion in this case (A. 48-49) and in his recent opinion in *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974), affirming a one-for-one (Black-White) hiring ratio for Alabama State Troopers, the decision of the Fifth Circuit here is in complete accord with and indeed was compelled by the overwhelming weight of authority in every other circuit which has ruled on the question of affirmative hiring relief in employment discrimination cases.

See, e.g., *Castro* vs. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (Boston police agencies) (reversed refusal to order affirmative hiring relief; District Court directed to establish hiring pools and hiring ratio, one-for-one, one-for-two, or one-for-three); *Bridgeport Guardians, Inc.*, v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973) Bridgeport Police Dept.) (affirmed affirmative hiring relief requiring defendants to fill 50% or more of patrolman vacancies with minorities until minorities constitute 15% of force); *Erie Human Relations Comm'n* v. *Tullio*, 493 F.2d 371 (3d Cir. 1974) (Erie Police Dept.) (affirmed order requiring one-for-one hiring for the next 20 vacancies); *United States* v. *IBEW Local No. 212*, 472 F.2d 634 (6th Cir. 1973) (affirmed order imposing mandatory quota of 11% Black membership in the union and creating minority preference); *United*

States v. *Carpenters Local No. 169*, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 851 (1972) (reversed and remanded to District Court to require construction unions to conform to Ogilvie Plan providing for affirmative hiring relief for Black trainees); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972) (Minneapolis Fire Dept.) (required one-for-two hiring ratio until 20 minority firemen are hired); *United States* v. *Ironworkers Local No. 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) (affirmed order providing minority preference for special apprenticeship programs and requiring future training classes to be 30% Black).[6]

The various circuits similarly are in accord that affirmative hiring remedies to correct racial discrimination do not constitute "reverse discrimination" in violation of the Fourteenth Amendment or the anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (j). See cases cited above and: *Assoc. Gen'l Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 42 U.S.L.W. 3593 (U.S. No. 74-1324) (April 22, 1974); *Contractors Assn.* v. *Shultz*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); *Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972).

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[6]Although the Fourth Circuit rejected plaintiffs' requests for hiring quotas in *Harper* v. *Kloster*, 486 F.2d 1134 (1973), it did affirm the District Court's order requiring that city residents be given preference in hiring over non-city residents, which in effect provided a minority preference, since a higher percentage of Blacks resided in Baltimore City than the surrounding counties which had become havens for White flight.

The fact that this Court has denied certiorari in a number of cases requiring or approving the use of numerical ratios to cure discrimination in hiring and employment indicates that there is no conflict of decision and that the issue fails to present a substantial question which should be resolved by this Court. E.g., *Assoc. Gent'l Contractors* v. *Altshuler*, supra; *Carter* v. *Gallagher*, supra; *United States* v. *Carpenters Local No. 169*, supra; *United States* v. *Ironworkers Local No. 86*, supra; *Contractors Assn.* v. *Shultz*, supra.

II. The Petition Presents No Important Question of Federal Law Which Needs To Be Resolved by This Court.

A. Immunity of State Officials from Mandatory Injunctive Relief. Petitioners' contentions to the effect that the Eleventh Amendment renders the guarantees of the Fourteenth Amendment inoperable and grants defendants immunity from a mandatory injunction enforcing the Fourteenth Amendment and Federal civil rights statutes (Petition, pp. 8-11) fails to present a substantial question of Federal law which needs to be resolved by this Court, given the many cases in which this Court has required state officials in their official capacity to take affirmative steps to secure constitutional rights. E.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (reapportionment). The Eleventh Amendment provides no shield for state officials confronted by claims that they have deprived persons of Federal

rights under color of state law provided — as in this case — the action is not against the state in name or in fact, and does not seek damages from the public treasury. *Scheuer* v. *Rhodes*, — U.S., —, 40 L.Ed.2d 90, 97 (U.S. Nos. 72-914 and 72-1318) (April 17, 1974); *Edelman* v. *Jordan*, — U.S. —, 39 L.Ed.2d 662, 673 (U.S. No. 72-1410) (March 25, 1974); *Georgia R. and Banking Co.* v. *Redwine*, 342 U.S. 299, 304-06 (1952); *Ex parte Young*, 209 U.S. 123 (1908).

B. Qualifications and Police Power. The Court of Appeals went no further than to require the District Court to follow the *Griggs* standards. If any employment qualification, including general intelligence tests and education requirements, "which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited" (401 U.S. at 431), and this requirement applies equally to public employers subject to the restrictions of the Fourteenth Amendment, *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. at 800, 802, n. 14 (citing *Castro* v. *Beecher*, supra, and *Chance* v. *Bd. of Examiners*, 458 F.2d 1167 (2d Cir. 1972), both public employment discrimination cases). As the Court of Appeals emphasized, the relief required "need not inexorably lead to the dilution of valid employment qualifications" (A. 43) nor to any restriction on the state's police power, but rather provides an improvement of those standards to make certain they determine, without discrimination, who is and who is not qualified, hopefully resulting in the improvement of equal law enforcement within Mississippi. Cf. *Harper* v. *Mayor & City Council of Baltimore*, 359 F.

Supp. 1187, 1213 (D. Md. 1973), aff'd sub nom. *Harper* v. *Kloster*, supra.

C. Plaintiffs' Standing. The District Court properly defined the plaintiff class to include "all qualified Negroes who have applied or will apply in the future for employment with the Mississippi Department of Public Safety and/or the Mississippi Highway Safety Patrol" (A. 83), and it is undisputed that the individual named plaintiffs, Morrow and Mangum, were members of this class, that is, they had applied for employment with the Highway Patrol and "were objectively qualified to receive an application form and to apply for positions as sworn officers of the Mississippi Highway Safety Patrol" (id.).

Although the District Court denied the individual plaintiffs immediate employment and back pay because the defendants presented a nonracial justification for their failure to give the plaintiffs application forms, the District Court did find that the defendants had engaged in a pattern and practice of racial discrimination in hiring and employment (A. 86), and granted the plaintiffs and the plaintiff class injunctive relief against future discrimination requiring that their applications be processed and their terms of employment be established without discrimination.

Subsequently, the supplemental record revealed that Mangum was rejected for employment for failing to pass the Army General Classification Test, which had a disproportionate adverse impact on Black applicants and which the Court of Appeals

found was not job validated, and Morrow was rejected for failing to meet the minimum weight requirement, although the District Court found that Whites had been employed as patrolmen who did not meet the weight minimum at the time of their application. (A. 76). Thus, contrary to petitioners' assertions (Petition, pp. 13-14), there is an actual case and controversy between the parties which is continuing, plaintiffs have suffered and continue to suffer threatened and actual injury resulting from the illegal actions of the defendants, and plaintiffs possessed and continue to possess a sufficient personal stake in the outcome to insure concrete adverseness in the presentation of issues. *O'Shea* v. *Littleton*, — U.S. —, 38 L.Ed.2d 682-83 (1974). Cf. *Huff* v. *N. D. Cass Co.*, 485 F2d 710 (5th Cir. 1973) (en banc); *Carr* v. *Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir.), cert. denied, 400 U.S. 951 (1970).

D. Discrimination by the Present State Official Defendants. This case is completely distinguishable from *Spomer* v. *Littleton*, — U.S. —, 38 L.Ed.2d 694 (1974) and *Mayor of City of Philadelphia* v. *Educational Equality League*, — U.S. —, 39 L.Ed.2d 630 (1974), upon which petitioners rely in claiming that the case is moot and that there is no justification for entering additional injunctive relief against the present defendants (Petition, p. 14). In both cases there was no evidence of discrimination by the successors to the original defendants nor supplemental findings indicating that the new officers would continue the practices of their predecessors (38 L.Ed.2d at 700; 39 L.Ed.2d at 645).

Unlike *Spomer* and *Educational Equality League*, here the present state officials who succeeded the original defendants were substituted as defendants by the District Court pursuant to Rule 25(d), F.R. Civ. P., after a hearing in the District Court and prior to decision by the Court of Appeals (A. 116). The present defendants themselves submitted to the Court of Appeals indisputable evidence from their own files and records that they were continuing the discriminatory hiring and employment patterns established by their predecessors (See Appendices A and B, attached). Referring to the updated submission by the present defendants, the Fifth Circuit made the supplemental findings that:

> "These figures alone negate the State's argument that its *present* practices are nondiscriminatory, and give no support whatsoever to any argument that the decree appealed from is sufficient to eliminate the effects of past racial discrimination." (A. 41, emphasis added)

Having been substituted as defendants by the District Court after a hearing, having prosecuted their cross-appeal in the Court of Appeals, and having presented to the appellate court indisputable evidence that their own present practices were discriminatory and that they were continuing the discriminatory practices of their predecessors, the present state official defendants are estopped from asserting here that they have been denied their day in court or that

the present action is moot. See, *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953).

E. Attorneys' Fees. The Award of counsel fees to the successful plaintiffs by the District Court (A. 92, 108) fell squarely within the traditional equitable power of federal courts to award such fees, whether justified (i) by the bad faith and dilatory defense by petitioners of an obvious case of employment discrimination, *Hall* v. *Cole*, 412 U.S. 1, 5 (1973); (ii) because plaintiffs' successful litigation confers a substantial benefit on the members of an ascertainable class which corrects or prevents an abuse which would be prejudicial to the rights and interests of others, *Hall* v. *Cole*, supra, at 5-6; *Mills* v. *Electronic Auto-Lite Co.*, 396 U.S. 375, 393-94, 396 (1970); and/or (iii) because plaintiffs acted as "private attorneys general" vindicating a policy that Congress considered of the highest priority, *Bradley* v. *School Board of City of Richmond*, — U.S. —, 40 L.Ed.2d 476, 486, 493, n. 27 (1974); *Hall* v. *Cole*, supra, 412 U.S. at 5, n. 7; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd, 409 U.S. 942 (1972).

Congress early expressed its intent that counsel fees should be awarded in successful civil rights litigation, Act of May 31, 1870, §§ 2, 3, 16 Stat. 140, and more recently has expressly authorized attorneys' fees to the prevailing party in employment discrimination litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), which is now applicable to state and local governments, governmental agen-

cies, and political subdivisions, P.L. 92-261, 86 Stat. 103, § 2(1) (March 24, 1972).

Awards of attorneys' fees against state and local officials in successful employment discrimination litigation pursuant to the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 are supported by the overwhelming weight of authority and present no conflict of decisions or substantial Federal question. E.g., *Fowler* v. *Schwarzwalder*, __ F.2d __, 7 EPD ¶ 9427 (8th Cir. 1974) (St. Paul Fire Dept. Officials); *Harper* v. *Mayor* and *City Council of Baltimore*, 359 F. Supp. 1187, 1217-18 (D. Md. 1973), aff'd, 486 F2d 1134 (4th Cir. 1973) (Baltimore Fire Dept. Officials); *NAACP* v. *Allen*, 340 Supp. 703, 707-10 (M.D. Ala. 1972), aff'd, 493 F2d 614, (5th Cir. 1974) (Alabama Dept. of Public Safety Officials); *Cooper* v. *Allen*, 467 F.2d 836, 841 (5th Cir. 1972) (Atlanta City Officials).

Petitioners assert that under *Edelman* v. *Jordan*, supra, an award of attorneys' fees against individual state official defendants is barred by the Eleventh Amendment (Petition, pp. 19-20), but the *Edelman* question is not presented here.

There is no hint in this case that the attorneys' fee award against individual wrongdoing state officials is the equivalent of an award of an accrued monetary liability which must be met from the general revenues of the state. Plaintiffs seek no recovery of money from the state, and in no sense is the state the real or substantial party in interest. The award of attorneys' fees was made as part of the costs of the litiga-

tion against the individual state official defendants for which they are liable, as any individual defendants, for their wrongdoing and unsuccessful defense of the litigation, and in no case has this Court held that such an award is barred by the Eleventh Amendment. Cf. *Scheuer* v. *Rhodes*, — U.S. —, 40 L.Ed.2d 90 (1974); *Bradley* v. *School Bd. of City of Richmond*, supra; *Northcross* v. *Bd. of Educ. of Memphis City Schools*, 412 U.S. 427 (1973); *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927). See, *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974); *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973) (rejecting Eleventh Amendment argument in awarding attorneys' fees against individual state officials).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1136

WILLIE L. MORROW AND JEROME MANGUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,
Cross Appellees,

versus

GILES W. CRISLER, COMMISSIONER OF PUBLIC SAFETY OF MISSISSIPPI, ET AL,
Defendants-Appellees,
Cross Appellants.

ON REHEARING EN BANC

DEFENDANTS' SUBMISSION ON EMPLOYMENT AND TESTING STATISTICS SINCE JANUARY 1, 1972

COME NOW the Defendants-Appellees, by their attorneys, and present for the *en banc* court a compen-

dium of the employment and testing statistics since January 1, 1972, to wit:

EMPLOYMENT PERIOD JANUARY 1, 1972, THROUGH OCTOBER 4, 1973

	TOTAL	WHITE	%	BLACK	%
APPLICATIONS RECEIVED	1,089	816	75%	273	25%
APPLICANTS TESTED	867	644	74%	223	26%
APPLICANTS PASSED	490	447	91%	43	9%
APPLICANTS FAILED	377	197	52%	180	48%
FAILED TO REPORT FOR TESTS	257	180	70%	77	30%
EMPLOYED BY DEPARTMENT	250	222	89%	28	11%
TERMINATED BY DEPARTMENT	162	150	93%	12	7%

Percent of whites hired who passed tests - 50%
Percent of blacks hired who passed tests - 65%

Percent of whites terminated during period - 68%
Percent of blacks terminated during period - 43%

RECRUIT SCHOOL
June 18, 1972

	TOTAL	*WHITE*	*BLACK*
NOTIFIED FOR TESTS	440	303	137
APPLICANTS TESTED	343	233	110
APPLICANTS PASSED	164	151	13
APPLICANTS FAILED	179	82	97
FAILED TO REPORT FOR TESTS	97	70	27
NOTIFIED FOR PHYSICAL EXAMINATION	164	152	12
APPLICANTS EXAMINED	158	147	11
APPLICANTS PASSED	84	80	4
APPLICANTS CONDITIONALLY PASSED	25	23	2
APPLICANTS FAILED	49	44	5
FAILED TO REPORT FOR PHYSICAL	6	5	1
APPLICANTS SELECTED FOR SCHOOL	48	43	5
FAILED TO REPORT FOR SCHOOL	0	0	0
APPLICANTS WHO LEFT SCHOOL	16	14	2
APPLICANTS DISMISSED FROM SCHOOL	0	0	0
RECRUITS GRADUATED 9-1-72	32	29	3

RECRUIT SCHOOL
January 7, 1973

	TOTAL	WHITE	BLACK
NOTIFIED FOR TESTS	113	93	40
APPLICANTS TESTED	99	73	26
APPLICANTS PASSED	54	50	4
APPLICANTS FAILED	45	23	22
FAILED TO REPORT FOR TESTS	34	20	14
NOTIFIED FOR PHYSICAL EXAMINATION	54	50	4
APPLICANTS EXAMINED	54	50	4
APPLICANTS PASSED	21	20	1
APPLICANTS CONDITIONALLY PASSED	23	20	3
APPLICANTS FAILED	10	10	0
FAILED TO REPORT FOR PHYSICAL	0	0	0
NOTIFIED FOR PHYSICAL REEXAMINATION	34	33	1
APPLICANTS REEXAMINED	24	23	1
APPLICANTS PASSED	20	20	0
APPLICANTS CONDITIONALLY PASSED	3	2	1
APPLICANTS FAILED	1	1	0
FAILED TO REPORT FOR PHYSICAL	10	10	0
APPLICANTS SELECTED FOR SCHOOL	40	39	1
FAILED TO REPORT FOR SCHOOL	5	5	0

APPLICANTS WHO LEFT SCHOOL	15	15	0
APPLICANTS DISMISSED FROM SCHOOL	0	0	0
RECRUITS GRADUATED 4-6-73	20	19	1

RECRUIT SCHOOL
April 22, 1973

	TOTAL	*WHITE*	*BLACK*
NOTIFIED FOR TESTS	131	92	39
APPLICANTS TESTED	99	73	26
APPLICANTS PASSED	56	54	2
APPLICANTS FAILED	43	19	24
FAILED TO REPORT FOR TESTS	32	19	13
NOTIFIED FOR PHYSICAL EXAMINATION	56	54	2
APPLICANTS EXAMINED	55	53	2
APPLICANTS PASSED	34	34	0
APPLICANTS CONDITIONALLY PASSED	6	6	0
APPLICANTS FAILED	15	13	2
FAILED TO REPORT FOR PHYSICAL	1	1	0
NOTIFIED FOR PHYSICAL REEXAMINATION	32	30	2
APPLICANTS REEXAMINED	24	23	1
APPLICANTS PASSED	15	15	0
APPLICANTS CONDITIONALLY PASSED	5	4	1
APPLICANTS FAILED	4	4	0

FAILED TO REPORT FOR PHYSICAL	8	7	1
APPLICANTS SELECTED FOR SCHOOL	50	49	1
FAILED TO REPORT FOR SCHOOL	2	2	0
APPLICANTS WHO LEFT SCHOOL	18	18	0
APPLICANTS DISMISSED FROM SCHOOL	8	7	1
RECRUITS GRADUATED 7-20-73	22	22	0

RECRUIT SCHOOL
September 2, 1973

	TOTAL	*WHITE*	*BLACK*
NOTIFIED FOR TESTS	142	94	48
APPLICANTS TESTED	102	70	32
APPLICANTS PASSED	50	44	6
APPLICANTS FAILED	52	26	26
FAILED TO REPORT FOR TESTS	40	24	16
NOTIFIED FOR PHYSICAL EXAMINATION	50	44	6
APPLICANTS EXAMINED	48	42	6
APPLICANTS PASSED	31	27	4
APPLICANTS CONDITIONALLY PASSED	10	9	1
APPLICANTS FAILED	7	6	1
FAILED TO REPORT FOR PHYSICAL	2	2	0
NOTIFIED FOR PHYSICAL REEXAMINATION	30	29	1

APPLICANTS REEXAMINED	21	21	0
APPLICANTS REEXAMINED	21	21	0
APPLICANTS PASSED	17	17	0
APPLICANTS CONDITIONALLY PASSED	0	0	0
APPLICANTS FAILED	4	4	0
FAILED TO REPORT FOR PHYSICAL	9	8	1
APPLICANTS SELECTED FOR SCHOOL	46	41	5
FAILED TO REPORT FOR SCHOOL	4	4	0
APPLICANTS WHO LEFT SCHOOL	18	15	3
APPLICANTS DISMISSED FROM SCHOOL	1	1	0
REMAINING RECRUITS	23	21	2

Respecfully submitted,

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/s/ HEBER LADNER, JR.
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	Whites	*Blacks*
Notified for Tests	582	264
Recruits Graduated (and Remaining Recruits)	91	6
Hiring Rate (applicants graduated or remaining in class as a percent of total no. of persons notified to report for tests by race)	15.6%	2.3%

Conclusions:

(1) A disproportionately larger number of whites have been hiring for patrolman positions (or remain

in recruit class during this period than blacks. Whites have been hired at a rate of more than 15 to 1 over blacks. 91-6 (a) a state where the white-black ratio is almost 3 to 2 (65-37).

(2) The hiring rate for white applicants (15.6%), based on the number of Patrol applicants notified for tests and the number of recruits graduated or remaining in recruit training class is 6.8 times the hiring rate for blacks (2.3%).

4. *Testing Discrimination, Department of Public Safety.* An analysis of test results, contained in the first column of figures, shows as follows:

	Whites	*Blacks*
Applicants Tested	644	223
Applicants passed	447	43
Pass Rate	69%	19%

Conclusion: The pass rate for whites taking tests for Department of Public Safety positions is 3.6 times the pass rate for blacks. This disparity is higher than that shown in any of the reported appellate court cases where a conclusion of racial discrimination in testing has been upheld. *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (pass rate for whites 2.6 times the pass rate for blacks); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 6 EPD ¶ 8755 (2d Cir. 1973) (pass rate for whites 3-1/2 times the pass rate for blacks and Puerto Ricans); *Chance* v. *Bd. of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) (pass rate for whites 1-1/2 times pass rate for blacks and Puerto Ri-

cans); *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (pass rate for whites 1.82 times pass rate for blacks).

5. *Testing Discrimination, Highway Patrol.* An analysis of the testing statistics for the Highway Patrol, compiled separately from the figures contained in the columns under the date for each recruit training school, shows an even greater disparity:

	Whites	*Blacks*
Applicants Tested	449	194
Applicants Passed	299	25
Pass Rate	66.6%	12.9%

Conclusion: The pass rate for whites taking tests for Highway Patrol positions is 5.2 times the pass rate for blacks, a disparity much greater than proven in any of the reported appellate cases where racial discrimination in testing has been found.

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